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IN THE

Supreme Court of the United States

October Term, 1964

No. 405

GERARD F. RE.

Petitioner.

—v.—

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gerard F. Re prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in a case entitled *United States of America* v. *Gerardo A. Re, a/k/a Jerry A. Re, Gerard F. Re, Charles A. Casagrande, a/k/a Charles A. Grande* and *Ely Batkin* on July 24, 1964 (*Appendix B, infra,* p. 29a).[1]

Citations to Opinions Below

There was no opinion in the District Court. The opinion of the Court of Appeals is set forth in *Appendix A* hereto, *infra,* p. 1a, and is not yet officially reported.

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1. References in parentheses, unless otherwise indicated, are to pages of the Appendices annexed to this petition. For the most part, however, references will be found, entitled "Appellants' Appendix". These are to pages of the combined Appendix submitted on behalf of the Appellants in the Second Circuit Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1964 (*Appendix B, infra*, p. 29a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether ledger sheets showing the disbursements from miscellaneous checking accounts, containing hearsay notations as to the names of persons who purportedly received the proceeds of checks made payable to "Cash", where

(a) neither the records themselves nor the testimony of the persons who made the entries reveal what business the entries are connected with or the business purpose of the cash disbursements,

(b) the source of the names of the alleged recipients of the cash is the extra-judicial statements of the principal defendant, who is a fugitive and not available for cross-examination or to dispute the entries, and

(c) the "business" is an alleged criminal conspiracy which had as its object the selling of unregistered stock by a "control person," who is not a stockbroker but a lawyer and business executive,

are admissible under the Business Records Act exception to the hearsay rule.

2. Whether the statutory language which makes it a criminal offense to use "a means or instrument of communication in interstate commerce" to sell an unregistered security should be construed as equivalent to "the floor of the American Stock Exchange" so that the Government

need not prove that the telephone or telegraph or similar instrument was used or that the communication went across state lines.

Constitutional Provisions and Statutes Involved

The petition raises issues under Amendments V and VI to the Constitution, the Securities Act of 1933, c. 38, Title I, § 5(a), 48 Stat. 77 (15 U.S.C. § 77e[a]) and the Business Records Act, c. 646, 62 Stat. 945 (28 U.S.C. 1732). They are printed in *Appendix C, infra*, pp. 31a *et seq.*

Statement of the Case

The petitioner, Gerard F. Re (hereinafter "Re, Jr."), respectfully refers this Court to the petition submitted by his father, Jerry A. Re (hereinafter "Re, Sr."), for a statement as to the proceedings and as to the outline of the case. In order to avoid duplication, this statement will be devoted solely to setting forth the background of the two questions being presented in this petition.

Admissibility of the "DeRisi Records"

One of the most crucial questions in the case involved the admissibility of certain records which purported to show cash payments by Lowell Birrell, totaling substantial amounts, to the principal defendants, e.g., nearly a quarter of a million dollars to the Res. There can be no doubt that, if their admission was erroneous, the error was seriously prejudicial. The Court of Appeals stated in its opinion that the evidence of those cash payments was "an important element in the Government's proof" that the Res were in a conspiracy with Birrell, and that the records in question were "an important factor" in establishing those payments (*Appendix A, infra*, p. 9a).

Those records, introduced into evidence by a bookkeeper named DeRisi, consist of four groups of lined, columnar sheets commonly used in ledger books of account, and purport to be a record of the money disbursed from four of the 15 to 20 checking accounts over which Birrell exerted control (*Appellants' Appendix,* pp. 172a-173a, 186a). The headings of those four accounts were: Birrell & Larson (Exh. 519), Birrell's law firm, and the names of three individuals, Harry Workman (Exh. 520), a man who lived in Canada; Ernest Espinosa (Exh. 521), a member of Birrell's personal entourage, and A. Hector Rivero (Exh. 522), a Cuban businessman. The latter three accounts DeRisi himself regarded as personal, as opposed to business, accounts (*Appellants' Appendix,* p. 187a). Both Espinosa and Rivero appeared as witnesses and testified that they had opened the checking accounts at Birrell's request for reasons which had absolutely nothing to do with the sale of Swan-Finch stock or any other stock (*Appellants' Appendix,* pp. 140a, 142a). Both men had, independently of each other, given Birrell checks on those accounts, signed in blank, because Birrell had told them that creditors were bothering him and he wanted to use their accounts to pay his personal bills (*Appellants' Appendix,* pp. 140a, 143a). There was no evidence at all as to how or why the Workman account was started or for what purpose Workman had given signed blank checks to Birrell.

The entries in the DeRisi records which the Government contended were relevant, and which were damaging to the defendants, related to a multitude of checks made payable to "Cash". Those entries are little notations (mostly in pencil, although the other entries are in ink), which, while not fitting into any vertical ruled column in

the ledger sheets, are connected with a horizontal line containing the number, date and amount of the check (see, *e.g., Appellants' Appendix,* pp. 176a-177a; Exh. 519, p. 56-21). The notations apparently were intended to indicate who were the recipients of the cash and how much they received, although there is no consistency in the symbols or initials which were employed to identify the supposed recipient (see *Appellants' Appendix,* p. 293a) and some of the notations are so ambiguous as to make it impossible to determine how much that individual is supposed to have received (*Appellants' Appendix,* pp. 179a-180a).

DeRisi obtained the information as to the supposed recipients of the cash largely from the check stubs of the various accounts at least within a month of the time the check was drawn (*Appellants' Appendix,* pp. 173a-175a). If he could not find such information on the stub, he would inquire around among other Birrell employees and, rarely, of Birrell himself as to what entry he should make (*Appellants' Appendix,* p. 175a). But it was clear that most of the information as to cash recipients dutifully recorded by DeRisi emanated from one person, Birrell. Most of the cash had been obtained from the bank by Birrell's chief messenger, Carter Whitney. He testified that he had delivered "virtually all of it" to Birrell (*Appellants' Appendix,* pp. 165a-166a). He then recorded in the check stubs the information which Birrell gave him as to what Birrell was going to do, or had done, with the money (*Appellants' Appendix,* pp. 167a-168a, 169a-170a, 171a). Thus the challenged notations were essentially a hearsay record of what Birrell said was happening to the cash being obtained for him by his messenger.

Moreover, neither DeRisi, the keeper of the records, nor Whitney, who turned the cash over to Birrell, nor any other person was able to testify as to what business was being conducted of which the cash entries were a record, or with what business transactions the cash payments were connected. When DeRisi testified, in answer to the stock leading questions, that the records were kept "in the regular course of business", and that it was "the regular course of business" to keep such records, he meant, as he admitted on the *voir dire*, "the regular course of a day's work", and he did not know what was the business to which the entries were related (*Appellants' Appendix*, pp. 175a-176a, 178a-179a, 182a, 183a-184a). Whitney also was unable to add anything to the picture (*Appellants' Appendix*, pp. 153a, 154a, 168a, 171a).

The records themselves, of course, also failed to show any business purpose for the cash disbursements, or even that they were connected with the sale of Swan-Finch stock or of any stock. Certainly there was no proof that the cash disbursements from the Birrell & Larson law firm account had anything to do with Birrell's law practice, since such proof would have run counter to the inferences which the Government contended should be drawn from the payments. Moreover, the notations indicated that cash payments were made to numerous other persons, as well as to the Res. The names of these persons were never mentioned in connection with the sale of any stock (see *e.g.*, *Appellant's Appendix*, pp. 162a, 167a, 169a, 176a, 179a-180a).

It is interesting to note that when the Government first offered evidence having the precise quality of that con-

tained in the DeRisi records, the trial court refused to admit it on the ground that the prejudice to the defendants from such hearsay outweighed its value (*Appellants' Appendix*, p. 157a). That evidence consisted of notations which Whitney had made on the backs of envelopes, of what Birrell had told him as to who was the recipient of cash. These notations were the source of the entries in DeRisi's records (*Appellants' Appendix*, pp. 154a-155a, 206a). Apparently impressed by the fact that this information eventually found its way into regularly-kept, familiar-looking books of account, the trial court allowed the DeRisi records into evidence (*Appellants' Appendix*, p. 163a).

In affirming that ruling on the ground that the DeRisi records qualified for admission under the Business Records Act (28 U.S.C. §1732), the Court of Appeals also relied heavily upon the facts showing business form, rather than substance (*Appendix A, infra*, pp. 11a-12a, pp. 14a-15a). It disposed of the problems raised by the lack of direct proof as to the business " business transaction to which the entries were related by holding that Birrell was engaged in the "business" or "occupation"—even though illegal and unorthodox—of distributing control stock to the public (*Appendix A, infra* pp. 12a, 14a). The court also held that the checking accounts reflected in DeRisi's records "were directly involved in the stock distribution" because (1) the names on two of those accounts had been used on *brokerage accounts* trading in Swan-Finch; (2) Birrell & Larson maintained a *brokerage account* with Birnbaum & Co.; and (3) the name of the individual on the fourth checking account appears as the source of Swan-Finch stock distributed through the Grande brokerage ac-

count (*Appendix A, infra*, pp. 12a-13a). The threshold requirements of the statute were thus met, the court held, and all other irregularities related only to the weight of the evidence and not its admissibility (*Appendix A, infra*, pp. 13a-14a, 15a).

Stock Exchange as Means of Communication in Interstate Commerce

In Count Two of the indictment, Re, Sr., Re, Jr., and Grande were charged with violating 15 U.S.C. §77e(a)(1) by using a means of communication in interstate commerce to sell 8900 unregistered shares of Swan-Finch Stock. It was alleged in the indictment that the "means of communication in interstate commerce" which they had used were the facilities of the American Stock Exchange (*Appellants' Appendix*, p. 28a). The alleged illegal transaction was a sale made simply between brokers on the floor of the Exchange, meeting face to face, without the use of a telephone or telegraph or other similar instrument of communication (*Appellants' Appendix*, pp. 146a-148a). On the selling side, Re, Sr., initiated the order to sell on the Exchange floor by suggesting the sale to the floor-broker for the firm which handled Grande's account (*Appellants' Appendix*, p. 146a). There was no evidence as to who had placed the orders to buy, with which the sell-order was matched, or as to how buy-orders had been placed. In sum, there was no evidence that the defendants had made any communication across state lines, so that the question clearly and necessarily posed was whether the use of the floor of the Exchange was equivalent to use of "a means of communication in interstate commerce" within the meaning of Section 77e(a)(1) (see *Appendix A, infra*, p. 17a).

In the Court of Appeals, the appellants argued that the words used by Congress in Section 77e(a)(1), taken in their common and ordinary sense, included only those complexes of physical things which can transmit a message across state lines, such as the telephone and telegraph systems, radio and television. The floor of the Exchange, on the other hand, like the board room of a national corporation, is a meeting room, used for the purpose of getting people together so that they may communicate with one another in an activity which may be within the stream of interstate commerce; such a place is not, in the common use of language, regarded as a means or instrument of *communication*, whether or not it is in interstate commerce. The court disposed of this argument by first noting that it had found no case in point on the common usage or plain meaning of the phrase in question. It therefore relied upon the opinion of the Securities and Exchange Commission that the Exchange itself was a means of communication in interstate commerce within the 1933 Act ". . . because of the intimate and unbroken relationship of transactions on such exchange to the interstate 'flow' of securities through such an exchange . . ." (*Appendix A, infra*, p. 19a). The court further indicated that, even without such bootstrap guidance, it would hold the same way because, regardless of the language of the statute, Congress had the desire to prohibit such sales as fully as the legislative power permitted (*Appendix A, infra*, p. 20a).

The court, moreover, rejected the suggestion that Congressional intent in the language of the 1933 Act could be ascertained from the 1934 Act, where phrases similar to the questioned language, *i.e.*, "means or instrumentality

of interstate commerce," were used in the disjunctive with the phrase ". . . any facility of any national securities exchange" (15 U.S.C. §§78i(a), 78j, 78k).

REASONS FOR GRANTING THE WRIT

1. Since 1943, when this Court last interpreted the Business Records Act in *Palmer* v. *Hoffman*, the various Courts of Appeal have been gradually subverting the principles established therein, reaching the nadir in the case at bar, so that the most damaging hearsay, regardless of whether its veracity is probable because it is a "routine reflection of the day-to-day operations of a business," is now admissible so long as it is systematically written down, and the burden has been left with the defendant to attempt to dispel its effects.

Not since 1943, when *Palmer* v. *Hoffman*, 318 U.S. 109, was decided, has this Court undertaken to offer guidance to the lower courts as to the proper interpretation of the threshold requirements for the admission of hearsay evidence under the Business Records Act (28 U.S.C. 1732). In that case this Court rejected as evidence a statement made by a train engineer, who signed it two days after an accident had occurred but who died before trial, on the ground that it was not a record made "in regular course of any business" within the meaning of that phrase in the statute.

Mr. Justice Douglas noted that the consequences of a rule which permitted the receipt of *any* record, merely because it was systematically made, would not accord with the reasons for the business records exception. He wrote as follows (318 U.S., at pp. 113-4):

> "The probability of trustworthiness of records because they were routine reflections of the day-to-day operations of a business would be forgotten as the basis of the rule [cases cited]. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability [cases cited] acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met."

We submit that the Court of Appeals below, carrying to an extreme the trend exhibited in many of the other Courts of Appeals cases which it cited (*Appendix A, infra*, pp. 13a-14a), abandoned the principles set forth above and failed to apply them in the case at bar—particularly those which require the test to be the "character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation." Instead, the court indicated its belief that the circumstances which show the "probability of trustworthiness" are those which show merely that the original statement was accurately recorded, rather than the circumstances which show the character of the source and the relationship of the record to the business.

If the principles laid down by this Court are to be followed and the words of the Act are given their historic meaning, we submit that the DeRisi records should be rejected on the basis of the following factors:

First, stripped of the mumbo-jumbo surrounding DeRisi's adherence to bookkeeping methods, the records primarily reflect the extra-judicial statements of the alleged arch-criminal, whose unavailability at the time of trial makes a mockery of the statutory permission to the defendant, after the admission of such evidence, to attack its weight.

Second, the "business" in which it is contended Birrell was engaged and for which the records were kept and which the Court of Appeals conceded was "not of the usual orthodox nature" (*Appendix A, infra*, p. 14a) was not the kind of "business," "occupation" or "calling" contemplated by the statute as having the earmarks of reliability. While it may well be that the mere fact that a business is illegal does not exclude it from the Act, at least it should be recognizable as a business, having the characteristics of "day-to-day operations," to a certain extent being openly and notoriously carried on as a business, even though outlawed because it does not have the requisite license or pay the taxes imposed, such as the illicit distillery in *United States* v. *Quick* (3rd Cir. 1942), 128 F. 2d 832.

In the case at bar, Birrell was engaged in the occupations or callings of a lawyer and business executive. He was not a stockbroker. Just because he engineered the selling of stock controlled by him, as part of a secret criminal conspiracy, did not make the selling of stock his occu-

pation or calling. A rapist is not in the business of committing that crime, no matter how often he does so. See, *Buckley* v. *Altheimer* (7th Cir. 1945), 152 F. 2d 502, 507. The fact that his selling of the stock without registering it was illegal and that he made the process complex in order to conceal his activities should not change the character of what he was doing. The reasons for the business records exception to the hearsay rule do not support labeling Birrell's activities and methods a "business" (see, Wigmore on Evidence, § 1522 [3d Ed. 1940]).

Third, the essence of Birrell's actvities was secrecy and deception. Such deception lay not only in his use of myriad corporate and personal names and accounts (see, *e.g.*, *Appellants' Appendix,* p. 290a); it lay also in the deception he practiced upon everyone dealing with him, including his closest associates. He apparently deceived two of the persons whose checking accounts he used as to the reasons why he did so. Not even his trusted employees, Whitney and DeRisi, knew the purpose of the cash payments. Records allegedly kept in such a scheme certainly fail to measure up as records having the probability of trustworthiness. The determination as to the business purpose or business relationship of the disputed entries was therefore based upon inference, surmise and conjecture, wholly unlike any business previously held to come within the provisions of the Act.

We submit that, if the Court of Appeals had given due weight to these factors within the intent of *Palmer* v. *Hoffman*, the records would have been held inadmissible. In ignoring them the court went beyond the purpose of the business records exception, into an area where the admis-

sion of Birrell's statements as recorded in his books constituted a violation of the defendants' right under the 6th Amendment to be confronted with the witnesses against them.

2. By interpreting "means of communication in interstate commerce" as the equivalent of "the floor of a national securities exchange," the Court of Appeals has held that *any* act or communication which occurs in a place which is in the stream of interstate commerce constitutes a federal crime, and has thereby created doubt and uncertainty as to the scope of a criminal statute, in violation of the defendants' right to due process, and has raised questions as to the constitutional extent of federal jurisdiction which Congress sought to avoid.

The Court of Appeals held that a violation of Section 77e(a)(1) took place merely because the sale of an unregistered security was made on the floor of a national securities exchange. It thereby eliminated any requirement that the sale should have a specific interstate or federal character, such as that the seller spoke on the telephone across state lines or used the mails. The interstate factor is to be found, the court held, in the character of the *place* where the sale occurs, which is defined in the statute only as "a means of communication in interstate commerce."

We submit that this holding destroys the common understanding of the language which Congress employed and does not give adequate warning of the conduct prohibited, in violation of the due process clause of the 5th Amendment.

If the floor of the American Stock Exchange is a "means of communication in interstate commerce", why not the president's office of United States Steel, or General Motors, or a waiting-room on the premises occupied by any division of the Bell Telephone System, or the National Broadcasting Company? The same rationale would apply. The facilities of any enterprise in the stream of interstate commerce, subject to federal regulation, would constitute a means of communication in interstate commerce. The language of the statute is thus stripped of its relatively precise meaning and embraces all kinds of places, rather than identifiable instruments of communication as, we submit, Congress intended.

The vagueness which such a holding imports into the statute can be illustrated by the S.E.C. opinion quoted by the Court of Appeals (*Appendix A, infra*, p. 19a). In that opinion, the S.E.C. states that only a stock exchange which "has become registered as a national securities exchange under the Securities Exchange Act of 1934" would have the requisite characteristics so that it might be regarded as a means or instrument of communication or transportation in interstate commerce. Yet that Act contemplates that there will be securities exchanges which will be exempt from registration as national securities exchanges

> "because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration" (15 U.S.C. § 78e).

Is the exempt exchange nevertheless so intimately involved in the interstate flow of securities that it is a

means of communication in interstate commerce within Section 77e(a)(1)? Can anyone ascertain from reading Section 77e(a)(1) that Congress intended the distinction which the S.E.C. thought it was necessary to make?

We submit that there was thus good and sufficient reason for Congress to include the specification in the 1934 Act that, in addition to instrumentalities in interstate commerce, as that phrase is commonly understood, the facilities of a national securities exchange, as defined in that Act, were also not to be used for certain prohibited conduct (15 U.S.C., §§ 78i[a], 78j, 78k).

It should be understood that we do not here contest the *power* of Congress to have prohibited use of the facilities of the exchanges in Section 77e(a)(1). But we submit that it did not do so. In attempting to remedy this *casus omissus*, the Court of Appeals has done more harm than good to the proper administration of our laws. In *United States* v. *Weitzel* (1918), 246 U.S. 533, this Court refused to correct a Congressional mistake (if mistake it was), Mr. Justice BRANDEIS writing as follows (at p. 543):

> "Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive."

3. The petitioner adopts the questions presented and every reason for granting certiorari submitted by his co-defendants insofar as they may be applicable to his case.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for certiorari be granted.

Respectfully submitted,

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RICHARD A. GREEN
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August, 1964

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 317—September Term, 1963.

(Argued March 2, 1964 Decided July 24, 1964.)

Docket No. 28526

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERARDO A. RE, a/k/a JERRY A. RE, GERARD F. RE, CHARLES A. CASAGRANDE, a/k/a CHARLES A. GRANDE and ELY BATKIN,

Defendants-Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Four defendants appeal from judgments of conviction entered after a jury verdict in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Each appellant was found guilty on count one, which charged a conspiracy to violate the Securities Act of 1933, 15 U. S. C. A. §§77e(a), 77e(c), 77q(a), 77x, the Securities Exchange Act of 1934, 15 U. S. C. A. §§78i, 78j(b), 78ff(a) and 17 C. F. R. §240.10b-5. Convictions were also entered on count two (Gerardo A. Re, Gerard F. Re and Charles A. Casagrande) and count three (Ely Batkin) both of which charged a violation of 15 U. S. C. A. §§77e(a)(1) and 77x and 18 U. S. C. A. §2.

The conviction of Batkin on count three is reversed with directions to dismiss that count of the indictment as to him. The convictions of appellants on counts one and two are affirmed.

SOMMERFIELD & JAMES (Irving A. James, Arthur M. Sommerfield, Jacob Grumet, of counsel), New York, N. Y., *for appellant Ely Batkin.*

MICHAEL P. DIRENZO, New York, N. Y., *for appellant Charles A. Casagrande.*

HARRIS B. STEINBERG (Stanley S. Arkin, of counsel), New York, N. Y., *for appellant Gerardo A. Re.*

RICHARD A. GREEN, New York, N. Y., *for appellant Gerard Re.*

PETER H. MORRISON, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, John S. Martin, Jr. and David M. Dorsen, Assistant United States Attorneys, of counsel), *for the United States of America.*

MOORE, *Circuit Judge*:

Gerardo A. Re, also known as Jerry A. Re (hereinafter Re, Sr.), his son Gerard F. Re (hereinafter Re, Jr.), Charles A. Casagrande, also known as Charles A. Grande (hereinafter Grande) and Ely Batkin appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York.

The case went to the jury after a ten-week trial on three counts of the original eight count indictment.[1] Count one charged appellants Re, Sr., Re, Jr., Grande and Batkin and defendants Lowell M. Birrell, Jacob Yaffe and Verna Skoglund with conspiracy to violate specified sections of the Securities Act of 1933 and the Securities Exchange Act of 1934[2] by using facilities of interstate commerce to sell unregistered stock of Swan-Finch Oil Corporation, to employ fraudulent methods in such sales, and to create the false appearance of an active Swan-Finch market on the American Stock Exchange. Count two charged that Re, Sr., Re, Jr., Birrell and Grande unlawfully made use of the facilities of the American Stock Exchange to sell 8,900 unregistered shares of Swan-Finch in violation of 15 U. S. C. A. §77e(a)(1), 77x and 18 U. S. C. A. §2. Count three charged that Batkin and Yaffe violated the same statutes in causing the mails to be used in the sale of 200 unregistered shares of Swan-Finch. The case against defendant Birrell, then a fugitive, was severed, and a judgment of acquittal was directed as to Verna Skoglund at the end of the Government's case. The jury found the remaining defendants guilty on each of the counts in which they were named. Yaffe, who was given a one year suspended sentence, has not appealed. Grande appeals only from his conviction on count two.

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[1] Counts four through seven charged separate violations of 18 U. S. C. A. §1001 on the part of Re, Sr., Re, Jr., and Grande in the course of a matter within the jurisdiction of the Securities and Exchange Commission while count eight charged they they conspired to violate that section. On a motion for severance, the district court held that the joinder was not defective under Rule 8(a) or (b) of the Federal Rules of Criminal Procedure. Nevertheless, to safeguard the interests of defendants Skoglund, Yaffe and appellant Batkin, he ordered a severance of these counts.

[2] 15 U. S. C. A. §§77e(a), 77e(c), 77q(a), 77x, 78i, 78j(b), 78ff(a) and Rule 10b-5 of the S. E. C., 17 C. F. R. §240. 10b-5.

THE EVIDENCE

Since the sufficiency of the evidence on the conspiracy count is conceded, it will suffice to sketch in broad outline the activities in which the jury could have found appellants to have been engaged. The Government's case centered on the stock market enterprises of defendant Birrell, who from 1954 until 1957 had engineered the sale of more than 800,000 unregistered shares of Swan-Finch stock while simultaneously manipulating its price on the American Stock Exchange. The Government sought to prove that Re, Sr. and Re, Jr., who functioned as "specialists"[3] in Swan-Finch and other stocks on the American Exchange, were instrumental in the market manipulation of Swan-Finch stock and distributed the major portion of Birrell's Swan-Finch stock by way of a network of twenty-one brokerage accounts. Grande was a longtime friend of the Res, and accounts in his name were among those used by them in the distribution. Batkin was the undisclosed principal in Sinclair Securities, an over-the-counter brokerage firm also deeply involved in the Swan-Finch distribution.

In so far as the conspiracy and substantive counts charged the unlawful sale of unregistered securities, 15 U. S. C. A. §§77e(a)(1), 77x, 18 U. S. C. A. §2, the Government proceeded on the theory that appellants knowingly participated in the sale of "control" stock which emanated from Birrell. Briefly, the Securities Act of 1933 proscribes the sale of unregistered stock by an "underwriter," *i.e.*, one

[3] For a thorough description and discussion of the role of the market "specialist," see generally Leffler, *The Stockmarket* 216 (2d ed. 1957); 2 Loss, *Securities Regulations* 1201-09 (2d ed. 1961).

who provides an outlet for the stock of an "issuer." See *United States* v. *Dardi*, 330 F. 2d 316, 325 (2d Cir. 1964); *United States* v. *Crosby*, 294 F. 2d 928, 939-40 (2d Cir. 1961), *cert. denied sub nom. Mittleman* v. *United States*, 368 U. S. 984 (1962). The relationship between Birrell (the "issuer") and appellants (the "underwriters"), therefore, was basic to the Government's proof.

Market Manipulation

Birrell acquired control of Swan-Finch[4] in May, 1954 and immediately committed 10,000 Swan-Finch shares to Re, Sr. and Grande by way of a three-month call. Within two months he had arranged to have the Res appointed specialists. Although it had been long dormant, Swan-Finch stock soon began a rather spectacular market rise. The Government's explanation of this sudden and uncalled for enthusiasm was that as specialists the Res knew exactly how much stock to buy or sell in order to raise or lower the market. With the Res' help, Birrell could control the price at will. There was also evidence that this manipulation extended to other stocks whose market performance was closely tied with that of Swan-Finch.

In June and July, 1956, Sidney Barkley and Charles Rosenthal, undisclosed principals in the over-the-counter brokerage firm of I. F. Stillman & Co., agreed with Birrell to enter the market rigging operation. The Stillman firm, which engaged in so-called "boiler-room" sales tactics, was to support the Swan-Finch market on the Exchange with

[4] Swan-Finch manufactured lubricating oils and greases. It enjoyed unlisted trading privileges on the American Exchange.

buy orders and later to sell the stock thus acquired over-the-counter. For this service, Birrell made "under-the-table" cash payments. Since the Stillman sales campaign depended largely on the closing price, Re, Sr. agreed to advise Barkley and Rosenthal of any increased selling so that Stillman could absorb the supply. Re, Sr. was also to tell Barkley and Rosenthal what was "on the book" so that they would know exactly how much to purchase to raise the price on any particular day.[5] If Stillman & Co. was unable to meet the sell orders, it was understood that Re, Sr. would make the purchase required to maintain the desired market level. On at least one occasion, Re, Sr., Barkley and Birrell met to review the Swan-Finch rigging operation. Barkley testified that Re, Sr., annoyed by Birrell's failure to deliver some stock, exclaimed that he did not care what happened to Birrell's market. Barkley interjected that he could not afford a market drop since his customers would refuse to pay if the market fell. Birrell was able to reassure Re, Sr. that the stock would be forthcoming and Re, Sr. seemed appeased. On one other occasion, Birrell told Re, Sr. to buy a large block of stock rather than let Swan-Finch suffer a drop in price.

The Distribution

While the market rigging continued with full vigor, the Res, Grande and Batkin were engaged in distributing Birrell's Swan-Finch stock. When Birrell acquired control in 1954, there were 34,794 shares of common stock outstand-

[5] The specialist is prohibited from disclosing the information on his "book" to anyone other than an official of the Exchange or a representative of the S. E. C. by 15 U. S. C. A. §78k(b).

ing. However, through a series of issuances and a three-for-one stock split, there were in excess of 2.8 million shares outstanding by January 15, 1957. Appellants participated in the distribution of approximately 800,000 of the more than 1 million shares which came to be controlled by Birrell. None of this Swan-Finch stock was registered with the Securities and Exchange Commission (S. E. C.).

The Res' distribution of over 600,000 shares of Birrell's Swan-Finch on the American Exchange was accomplished by means of twenty-one stock accounts maintained at three brokerage houses. Nineteen of these accounts, according to the Government, were opened, controlled and managed exclusively by the Res and they controlled the Swan-Finch activity in two others. Accounts opened in Grande's name were the vehicles by which a total of 498,500 shares were distributed; other accounts, maintained in the names of relatives and friends of the Res and Birrell or controlled by Birrell, were employed for the sale of an additional 117,700 shares. Accounts maintained by the Res began to sell Birrell's stock the day they became specialists in Swan-Finch. Generally, they would sell shares from an account of their choice and then, to cover the sale, cause stock to be delivered to that account from a Birrell-controlled source at a price below the market. There was evidence that the floor partner for Josephthal & Co., where the substantial Grande accounts were maintained, gave the Res orders on a "not held" basis which permitted them to exercise discretion in their execution.[4]

The Res' distribution on the Exchange was augmented by the over-the-counter sales of three firms: I. F. Stillman

[4] This is specifically prohibited by 15 U. S. C. A. §78k(b).

& Co., L. S. Mack & Co., and Sinclair Securities Corporation. Barkley and Rosenthal (I. F. Stillman & Co.) successfully "boiler-roomed" approximately 70,000 Swan-Finch shares which they had acquired on the Exchange in cooperation with the Res and Birrell. Birrell supplied stock to L. S. Mack & Co. at $5.00 per share and also gave Lloyd Mack, the firm's principal, an under-the-table cash payment based on the price at which Mack was able to sell to the public. Birrell chose the "S & C Trading Co., Inc." to camouflage his transactions with Mack, which eventually accounted for the sale of 21,925 shares.

The most effective participant in the over-the-counter distribution was Sinclair Securities. While ostensibly owned and managed by defendant Yaffe, the Government's proof readily allowed the inference that appellant Batkin was an undisclosed owner and that he actively engaged in Sinclair's sales of Swan-Finch. Although most of the 197,608 shares sold by Sinclair were obtained from Birrell, the books of Sinclair indicated fictitious sources. Batkin and Yaffe, along with the Res and the other participants in the distribution, received surreptitious cash payments from Birrell.

On this appeal, appellants urge that their convictions must be reversed on a variety of grounds. They attack the relevant provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 as vague and indefinite, and argue as well that the floor of the American Stock Exchange is not a means of communication in interstate commerce. Errors arising from the conduct of the trial are said to include the admission of hearsay business records and

the Government's knowing use of the testimony of a witness who was then the client of an attorney who had earlier represented the Res. Re, Jr. and Grande challenge their convictions on count two on the ground that the Government failed to prove that they had anything to do with the sale alleged. In a similar vein, Batkin contends that there was no proof that the 200 shares described in count three were in fact "control" shares; in addition he argues that he was denied a fair trial due to the admission of inculpatory testimony of the Res and Grande before the S. E. C.

THE "DERISI" RECORDS

Evidence of cash payments in substantial amounts was an important element in the Government's proof that appellants Re, Sr., Re, Jr., Batkin and other defendants were intimately allied with Birrell in the unlawful distribution and market manipulation. Although there was much additional proof to the same effect, the so-called "DeRisi" records were an important factor in establishing Birrell's payments to the alleged co-conspirators. Appellants claim that these records constituted hearsay and that their introduction into evidence was reversible error.

Joseph DeRisi was employed by Birrell as his bookkeeper from 1952 until 1958. At all times he took his orders directly from Birrell and worked without other supervision. He was chiefly concerned with keeping the books related to various corporations and personal bank accounts, all of which were controlled by Birrell. At trial, the Government's proof focused on the cash disbursement books of four of these accounts, those entitled "Birrell & Larson,"

"Harry Workman," "Ernest Espinosa" and "A. Hector Rivero." In connection with the many checks drawn on these accounts payable only to "cash," DeRisi's records showed notations which purported to identify the recipients. When totalled it was revealed that $239,180 had been paid to the Res while $246,800 was distributed to "Sinclair," "Yaffe" and "Bob," who, the jury was entitled to infer, was actually appellant Batkin.

The information which eventually found its way into the records kept by DeRisi came from the checkbook stubs of each account. Carter Whitney, Birrell's messenger and man "Friday," defendant Verna Skoglund, Birrell's secretary, DeRisi and perhaps Mrs. Skoglund's replacement, Miss Miller, always at Birrell's direction, wrote the checks. Birrell identified the recipient either when the check was drawn or when the cash was delivered. The practice was to note initials or some other abbreviation to identify on the stub the recipient of a check made payable to cash. The checkbooks were stored in a file cabinet in Whitney's office in Birrell's executive suite at Doeskin Products; the cabinet was kept locked and only Birrell, DeRisi, Mrs. Skoglund and Whitney had keys. In general, matters concerning the various accounts with which DeRisi was concerned were treated confidentially by Birrell and his office employees.

About two or three times a month, DeRisi examined these stubs and entered the amounts of the checks cashed along with the recipient there designated in the appropriate cash disbursement book "so that the bank statement could be reconciled with the cash book." DeRisi testified that he did so "in the regular course of business." On some occasions,

however, the check stub was incomplete, and DeRisi had to ask Whitney, Mrs. Skoglund or, "very rarely," Birrell himself, who the recipient had been. DeRisi would then complete the stub and make the appropriate cash book entry. He did not enter a recipient in the cash disbursement book when stub information was insufficient and no explanation was given by Whitney, Mrs. Skoglund or Birrell.

The Business Records Act, 18 U. S. C. A. §1732 provides in relevant part:

> "Record made in regular course of business; photographic copies.
>
> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> *All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.*
>
> The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind." (Emphasis added.)

As appellants concede, the DeRisi records have all the superficial trappings of business regularity that customarily

vouchsafe the absence of any motive to misrepresent. The records were kept on familiar ledger forms, were scrupulously regular, were made within a reasonable time after the transaction, and were prepared for a seemingly natural purpose under the specific orders of the employer. DeRisi described them as a "set of books" consisting of "a cash receipts book, a cash disbursements book, a general ledger and a general journal." Nevertheless, appellants urge on various ground that DeRisi's records amounted only to a diary of Birrell's personal affairs and that they lacked the traditional earmarks of trustworthiness contemplated by the statute.

There is no merit in the claim that because most of the information recorded by DeRisi reflected the affairs of one person—Birrell—that the records were merely "personal" and as such not within the purview of the Business Records Act. The statute makes no such qualification. "Business," is broadly defined so as to include "business, profession, occupation and calling of every kind." That Birrell, while distributing a huge block of control stock to the investing public through a complex system of brokerage accounts and over-the-counter sales, was engaged in a "business" or an "occupation" seems so obvious that discussion is scarcely necessary. And, the Government's proof makes it equally clear that the accounts which DeRisi's books reflected were directly involved in the distribution. For example, accounts in the names of Hector Rivero and Ernest Espinosa were used at Josephthal & Co. as vehicles for distribution and as sources of stock at Sinclair. An account in the name of Birrell & Larson was maintained at Birnbaum & Co. The

Harry Workman account appears as the source of Swan-Finch stock delivered to the Grande accounts at Josephthal & Co. and Ira Haupt & Co.

The fact that Birrell's business of distributing unregistered shares of Swan-Finch was unlawful does not affect the admissibility of his records as kept by DeRisi. "The Act does not discriminate between lawful and unlawful businesses." *United States* v. *Quick*, 128 F. 2d 832, 837 (3d Cir. 1942); see *United States* v. *Quong*, 303 F. 2d 499 (6th Cir.), *cert. denied*, 371 U. S. 863 (1962); *Arena* v. *United States*, 226 F. 2d 227 (9th Cir. 1955), *cert. denied*, 350 U. S. 954 (1956); *Spear* v. *United States*, 216 F. 2d 185 (4th Cir. 1954); *Fischer* v. *United States*, 212 F. 2d 441 (10th Cir. 1954). Moreover, courts have consistently given full effect to the statute's sweeping declaration that the "circumstances of the making" have a bearing only on the weight to be given the writing and not on its admissibility. Thus, irregularities similar to those found here, such as the informality of the abbreviations, see *Arena* v. *United States*, *supra*; *United States* v. *Alaimo*, 191 F. Supp. 625, 628 n. 7 (M. D. Pa.), *aff'd*, 297 F. 2d 604 (3d Cir. 1961), *cert. denied*, 369 U. S. 817 (1962), possible inconsistencies, see *LaPorte* v. *United States*, 300 F. 2d 878 (9th Cir. 1962), inaccuracies, see *United States* v. *Bernard*, 287 F. 2d 715 (7th Cir.), *cert. denied*, 366 U. S. 961 (1961), or incompleteness, see *United States* v. *Kimmel*, 274 F. 2d 54 (2d Cir. 1960) have not precluded admissibility, but have been factors for the jury to evaluate in considering the writing along with the other evidence. See also *Bodnar* v. *United States*, 248 F. 2d 481 (6th Cir. 1957). The fact that the records were not maintained in the most businesslike or efficient way is likewise imma-

terial on the threshold issue of admissibility. Furthermore, the statute itself expressly disposes of any difficulty presented by the fact that DeRisi in most instances lacked "personal knowledge" of the fact recorded by each entry. In sum, the minimum requirements of admissibility were clearly satisfied. See *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F. 2d 792, 796 (2d Cir. 1962).

Here there was an additional guarantee of reliability in that DeRisi did not gather his information from random sources but from fellow employees who also were acting in the regular course of business in making notations on the stubs in the first instance and in passing the data to DeRisi orally later on if they had neglected to mark the checkbook properly. See *United States* v. *Grayson*, 166 F. 2d 863, 869 (2d Cir. 1948). See generally Note, *Revised Business Entry Statutes*, 48 Colum. L. Rev. 920, 924-27 (1948).

It is, of course, true that records kept in the course of Birrell's enterprise do not fall into the category of the usual set of books found in the offices of legitimate commercial or industrial enterprises. Birrell's "business," "occupation" or "calling," however, was not of the usual orthodox nature. The very fact that the illegal distribution of 800,000 shares of unregistered stock by persons who had to be encouraged by cash payments to aid in achieving such a distribution by means of various accounts might well have called for an unusual set of books kept in an unusual manner. The proof is convincing that Birrell relied upon DeRisi as the keeper of his books, that DeRisi employed such means as were available within the Birrell business family

to record the entries on a regular basis and that DeRisi pursued his bookkeeping on a regular basis whether the books were physically located in the Doeskin office, at a Pennsylvania farm or in his own basement office (created at Birrell's suggestion).

To effect his stock transactions Birrell apparently thought it necessary to keep some records. The theory of section 1732 is to avoid the necessity of producing the person who actually participated in the transaction and then tracing through witnesses every step from payment to book entry. The Birrell books through DeRisi were subjected to *voir dire* and cross examination. The jury was made aware of the strength and weakness of the entries. There was no error in admitting the books in evidence.

The Government argues also that the records were admissible as acts or declarations by a conspirator in furtherance of the conspiracy. To support this thesis it points to the necessity in such a complicated operation of maintaining some kind of record of the various accounts and of the distribution of the profits. Appellants, in turn, contend that it must be established that the records were made to further some object of the conspiracy before they are admissible and that these records do not fall into such a category. It is unnecessary to resolve this question in view of our opinion that the records were admissible under section 1732.

THE ANTI-MANIPULATIVE PROVISION OF THE SECURITIES EXCHANGE ACT OF 1934 AS APPLIED TO SPECIALISTS

The first count of the indictment charged both Res with conspiring with Birrell and the other defendants to manipu-

late the market price in Swan-Finch in violation of the Securities Exchange Act of 1934, 15 U. S. C. §78i, 78j(b), 78ff(a) and Rule 10b-5 of the S. E. C., 17 C. F. R. §240.10b-5. Reduced to the essentials, appellants' argument is that the proscriptions of sections 78i(a)(2) and 78j(b) are irreconcilably inconsistent with the legitimate duty *of a specialist* under sections 78k(a) and (b)(2) to "maintain a fair and orderly market." They argue that "the result is an inconsistent, vague and confusing statutory scheme which fails to give adequate warning to a specialist of what he can and cannot do." There is no suggestion, however, that sections 78i(a)(2) and 78j(b) are unconstitutionally vague as applied to non-specialists, a theory previously rejected in this circuit. See *United States* v. *Minuse*, 142 F. 2d 388 (2d Cir.), *cert. denied*, 323 U. S. 716 (1944); *Wright* v. *S. E. C.*, 112 F. 2d 89, 94 (2d Cir. 1940).

Basic to appellants' defense was the claim that they acted in the legitimate role of specialists, not as market manipulators. This issue was fairly submitted to the jury by the trial court in his charge, which placed before them the question of whether the Res were acting as legitimate specialists. The court charged:

> "Two of the defendants—Re, Senior, and Re, Junior —were specialists in Swan-Finch on the American Stock Exchange, and their counsel has contended that a specialist is charged with the duty of maintaining an orderly market. So in determining the application of this section to them you must determine whether the evidence shows that Re, Senior, and Re, Junior, were maintaining an orderly market in Swan-Finch, as they were required to do as spe-

> cialists, or whether the government has proved beyond a reasonable doubt that they were knowingly and wilfully engaging in manipulating the price of the stock in the manner declared unlawful by the statute."

Inherent in the jury's verdict of guilt on the first count, therefore, was the determination that the Res were not performing the function of specialists in their dealings with Birrell in Swan-Finch. As the Court said in *United States* v. *Wurzbach*, 280 U. S. 396, 399 (1930), "the objection to uncertainty concerning the person embraced need not bother us now. . . . [I]t will be time enough to consider it when raised by someone whom it concerns." To the same effect see *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Dennis* v. *United States*, 341 U. S. 494, 516 (1951).

THE STOCK EXCHANGE AS A MEANS OF COMMUNICATION IN INTERSTATE COMMERCE

A question squarely posed by the Res' challenge to their conviction on count two is whether the floor of the American Stock Exchange is a means of communication in interstate commerce within the purview of 15 U. S. C. A. §77e(a)(1). That section provides, in relevant part, that "it shall be unlawful for any person . . . (1) to make use of any means or instruments of . . . communication in interstate commerce or of the mails to sell [an unregistered] security." In the transaction depicted in count two, Re, Sr. initiated from the floor of the Exchange a sale of 8,900 shares of Swan-Finch emanating from another broker and the account of appellant Grande. There was no allegation in the indictment of a use of the mails or telephone facilities

in connection with the sale. Appellants contend that because several sections of the Securities Exchange Act of 1934, 15 U. S. C. A. §78i(a), 78j and 78k, specify "any facility of any national securities exchange," Congress could not have intended the phrase "means . . . of communication in interstate commerce" in the Securities Act of 1933 to include the floor of the American Exchange. Furthermore, while conceding that the Exchange floor may be considered as "contributing meaningfully to the stream of interstate commerce," appellants urge that the ordinary meaning and common usage of the language of the 1933 Act in itself prohibits a construction which would encompass the floor of a stock exchange. We cannot agree, and consequently hold that section 77e(a)(1) includes as a "means . . . of communication in interstate commerce" the floor of the American Stock Exchange.

Appellant's first theory, that the specific inclusion of "any facility of any national securities exchange" in the 1934 Act necessarily meant that Congress had intentionally excluded such a facility from more general language in the earlier Act, is not persuasive. See *United States* v. *Price*, 361 U. S. 304, 313 (1960); *Fogarty* v. *United States*, 340 U. S. 8, 13-14 (1950); *United States* v. *United Mine Workers*, 330 U.S. 258, 282 (1947). A somewhat similar problem was recently presented in *United States* v. *Roth, et al*, —— F. 2d —— (2d Cir. 1964), where two employers were convicted after arranging a loan in violation of 29 U. S. C. A. §186(a), prior to its amendment. The original enactment prohibited an employer from paying or delivering "any money or other thing of value" to a representative of his

employees. As amended, the section specifically included loans within the general prohibition. In holding that Congress' subsequent particularity did not detract from the unambiguous general provision of the original, we noted that the coverage of the earlier statute must be ascertained from its own terms. Such an approach is particularly appropriate here where two fundamentally different, if complementary, regulatory schemes are involved.

We likewise find no merit in appellants' alternative theory, that common usage and the plain meaning of the statutory terms preclude a holding that the floor of the Exchange is a means of communication in interstate commerce. We have found no federal court opinion precisely on point and have been cited to none. However, the S. E. C. has considered the question and has consistently held that a national stock exchange is a means of communication in interstate commerce within the Securities Act of 1933. The reasoning supporting this position was well-stated in *Brooklyn Manhattan Transit Corp.*, 1 S. E. C. 147, 173 (1935).

> "It would appear that a stock exchange . . . which has become registered as a national securities exchange under the Securities Exchange Act of 1934 may, because of the intimate and unbroken relationship of transactions on such exchange to the interstate 'flow' of securities through such an exchange [citing cases], in itself be regarded as a means of or instrument of communication or transportation in interstate commerce . . ."

See *Cady, Roberts & Co.*, S. E. C. Securities Exchange Act Release No. 6668, CCH Fed. Sec. L. Rep. ¶76,803 (1961):

Consolidated Development Corp., S. E. C. Securities Act Release No. 4287, CCH Fed. Sec. L. Rep. ¶76,723 (1960); 3 Loss, *Securities Regulations*, 1520-21 n. 4 (2d ed. 1961).

We think that the construction adopted by the S. E. C. is in harmony with the plain meaning of the statute. See *S. E. C.* v. *Associated Gas & Electric Co.*, 99 F. 2d 795, 798 (2d Cir. 1938). Indeed, even without such guidance, we would be quite reluctant to hold that transactions on the floors of the various national exchanges, the market places and nerve centers of national financial activity, were not encompassed within the broad language of the 1933 Securities Act. In *Schiller* v. *H. Vaughan Clarke & Co.*, 134 F. 2d 875, 878 (2d Cir. 1943), this court commented: "In declaring unlawful the transactions described in section 5 Congress meant to exert its power to the full constitutional extent permitted by the commerce clause and the postal clause."

THE "CONTROL" CONCEPT UNDER THE SECURITIES ACT

Appellant Batkin advances the theory that the concept of "control" stock is unconstitutionally vague and indefinite since "control" is nowhere defined in the statute and that the trial court's instructions on this point were defective. Neither contention is well taken. The meaning of "control" under the act is no different than it is in normal everyday usage. "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." *Sproles* v. *Binford*, 286 U. S. 374, 393 (1932); *cf. United States* v. *Guterma*, 281 F. 2d 742, 746-47 (2d

Cir.), *cert. denied*, 364 U. S. 871 (1960); *United States* v. *Minuse*, *supra*. The instructions to the jury in this connection were sufficient. In any event, appellants failed to object to the portions of the charge now thought to be inadequate. Fed. R. Crim. P. 30.

ADMISSION OF CO-DEFENDANTS' S. E. C. TESTIMONY

In the course of the trial the Government read to the jury 340 pages of testimony previously given before the S. E. C. by Re, Sr., Re, Jr. and Grande. The purpose of this recital was to establish guilty knowledge on the part of those defendants. The S. E. C. testimony contained no references to Batkin. Before each defendant's testimony was read, the prosecutor stated that it was offered solely against the defendant who gave it, and the trial court, both before and after each of the three readings, specifically and thoroughly instructed the jury to the same effect. Again, in its charge, the court reiterated that such testimony could be considered "only with respect to the defendant allegedly involved in each instance and with respect to whom the testimony was received."

Batkin's unsupported claim that he was denied a fair trial because of the admission of the S. E. C. testimony is without merit. The testimony made no mention of his involvement in the conspiracy or in the substantive count. See *Delli Paoli* v. *United States*, 352 U. S. 232, 237 (1957). Moreover, the trial court made "clear and repeated admonitions to the jury at [the] appropriate times . . . [T]o say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disre-

garded clear instructions of the court in arriving at their verdict." *Opper* v. *United States*, 348 U. S. 84, 95 (1954); see *United States* v. *Dardi*, *supra*, 330 F. 2d at 334; *United States* v. *Aviles*, 274 F. 2d 179, 192-93 (2d Cir.), *cert. denied*, 362 U. S. 974 (1960); *United States* v. *Kaye*, 251 F. 2d 87, 90 (2d Cir.), *cert. denied*, 356 U. S. 919 (1958).

Batkin also contends that because four perjury counts based on this same testimony had been severed prior to trial it was error for the trial court to allow the transcript to be read into the record.[7] However, the ruling on the motions for severance of the perjury counts was necessarily made solely on the information contained in the indictment. The trial judge, on the other hand, had the benefit of the opening arguments and several weeks of trial. He had also examined the S. E. C. material before allowing it to be read into evidence. Under these circumstances, the trial judge was not prohibited from ruling as he did.

SUFFICIENCY OF THE EVIDENCE ON COUNTS TWO AND THREE

1. *Appellant Batkin*

The only proof in the record going directly to the allegations of count three, which charged a sale of 200 shares of Swan-Finch by Batkin and defendant Yaffe, was a stipulation of counsel. It was agreed that one Ernest Lehne of Brownton, Minnesota if called to testify would say that he purchased 200 shares of Swan-Finch from Sinclair Securities and thereafter received its confirmation of the sale through the mail. The trial court properly instructed the

[7] This testimony was the basis for counts four through eight of the indictment. See footnote 1, *supra*.

jury that it would find Batkin guilty on this count if he "acquired the stock [*i.e.*, the 200 shares sold to Lehne] from Birrell with a view to offering it to the public or participated with Birrell in the sale of the stock to the public." Batkin reasons that his conviction on this count must be reversed because there was no evidence that Birrell, the "control" person, was the source of the 200 shares. The Government concedes that it presented no proof that these 200 shares emanated from Birrell, suggesting that it had no obligation to do so because the jury could find from all the evidence that this sale was in furtherance of the conspiracy alleged in count one.

It is settled that the Government need not prove that an "underwriter" acquired the "control" shares directly from the "issuer" or control person. *S. E. C.* v. *Culpepper*, 270 F. 2d 241, 246-47 (2d Cir. 1959); see *S. E. C.* v. *Chinese Consol. Benev. Ass'n*, 120 F. 2d 738 (2d Cir.), *cert. denied*, 314 U. S. 618 (1941); *Reiter-Foster Oil Corp.*, 6 S. E. C. 1028, 1035-36 (1940). Nonetheless, there must be sufficient proof that the shares actually sold were in fact "control" shares.

While Batkin's complicity in the conspiracy may have been proven by abundant evidence, it was still necessary for the Government to establish that the transaction depicted in count three was in itself unlawful. See *United States* v. *Agueci*, 310 F. 2d 817, 828 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963). Since there was no evidence from which the jury could find that the 200 shares of Swan-Finch sold by Sinclair Securities came from Birrell, Batkin's conviction on count three must be reversed.

2. *Appellants Re, Jr. and Grande*

Re, Jr. and Grande also question the sufficiency of the evidence but the thrust of their argument is much different than Batkin's. They concede that Re, Sr. caused 8,900 unregistered shares of Swan-Finch to be sold on the floor of the Exchange as charged in count two and that those shares constituted "control" shares. They also admit that "there was evidence which tended to show that Gerard Re (and Grande) may have done things to facilitate the transmission of the stock through Haupt's office to the buyers. . . ." The error, they argue, is that their participation was connected not with the sale, 15 U. S. C. A. §77e(a)(1), but with the *delivery*, a different and distinct offense covered by 15 U. S. C. A. §77e(a)(2). Whatever the merits of this contention, it ignores the fact that count two also charged a violation of the aider and abetter statute, 18 U. S. C. A. §2. Thus, the court instructed the jury: "[I]f you find that the particular defendant did not himself violate the Securities Act, but if you find that he aided, abetted, counseled or induced another to violate it, he is just as guilty as if he had violated the Act himself." By facilitating the transmission of the stock so as to complete the transaction, Re, Jr. and Grande associated themselves with the sale and thus could have been found to have aided and abetted Re, Sr. See *United States* v. *Campisi*, 248 F. 2d 102, 104 (2d Cir.), *cert. denied*, 355 U. S. 892 (1957); cf. *S. E. C.* v. *Culpepper*, *supra*, 270 F. 2d at 247.

THE ALLEGED MISCONDUCT OF THE RES' FORMER LAWYER

The Res seek a reversal on all counts because an attorney, a "Mr. Z,"[8] who at one time had represented them, also represented one Nahum Birnbaum, a Government witness at trial. After a thorough hearing, which included the testimony of Mr. Z, the trial court concluded that appellants' rights had not been prejudiced and that appellants had not been denied a fair trial.

Birnbaum's firm, Birnbaum & Co., was a longtime client of the law firm in which Mr. Z was a partner. In 1957, Birnbaum & Co. was a respondent, as was the Re firm, in an action in which the S. E. C. sought to enjoin the sale of Swan-Finch stock. Mr. Z appeared for Birnbaum & Co. and the Re firm was represented by another lawyer. In 1961, the Res retained Mr. Z when the S. E. C. acted to revoke their registration as broker-dealers due to their dealings in Swan-Finch stock. At that time, Mr. Z explained to the Res that his firm represented Birnbaum and that he could not take any employment that would be inconsistent with Birnbaum's representation; however, Mr. Z saw no conflict and agreed to act on behalf of the Res in the revocation proceeding. Shortly after that matter was completed, the Res were arrested on a complaint which charged market violations concerning the stock of Thompson-Starrett Company, Inc. At their request, Mr. Z appeared as attorney of record before the United States Commissioner to fix bail, and after the arraignment represented the Res at one or two conferences at the United States Attorney's Office. However, Mr.

[8] To avoid embarrassment, we join the parties in not referring to the lawyer or his firm by the correct name.

Z was soon replaced and had no further association with the Res.

Birnbaum was subsequently called to testify before the Grand Jury, but Mr. Z was involved only to the extent of arranging for the time and place of Birnbaum's appearance. Mr. Z was not present during Birnbaum's interviews at the United States Attorney's Office, and did not confer with Birnbaum about his testimony before or after it was given. After the return of the Res' indictment, Mr. Z did not discuss the case with Birnbaum, and the only connection Mr. Z or his firm had with Birnbaum's testimony at trial was supplying a photostatic copy of one of Birnbaum's records. Mr. Z testified that he never discussed with Birnbaum or any Government official any aspect of his representation of the Res. Thus, Mr. Z and his firm represented Birnbaum in connection with the Re prosecution only to the point of arranging a time and place for his Grand Jury appearance. Birnbaum continued, however, as a client of the firm.

The Government agrees that it had notice of Mr. Z's appearance for the Res and of his representation of Birnbaum. For purposes of this appeal, it assumes that the Res gave confidential material to Mr. Z.

Lacking even the most remote evidence that confidences of the Res were in fact violated, appellants invoke the proposition that where identity of subject matter of a litigation is shown, an irrebutable inference arises that a lawyer who has represented both parties will have obtained and used confidences of the former client to the detriment of that client in the pending litigation. However, assuming,

without deciding, both the correctness of this theory and its automatic applicability in a criminal case to warrant a reversal of a conviction, we do not see that it can serve appellants under these facts. In *T. C. Theatre Corp.* v. *Warner Bros.*, 113 F. Supp. 265 (S. D. N. Y. 1953), from which appellants seem to derive their theory, defendant corporation moved to disqualify a lawyer for the plaintiff who had earlier represented defendant on an appeal from an adverse judgment in an anti-trust case. The litigation then pending alleged substantially the same conspiracy found to exist in the earlier case. Thus, there was a *prima facie* violation of Canon 6 of the Canons of Professional Ethics. However, the now lawyer for the plaintiff claimed that no confidence had, in fact, been divulged. In granting defendant's motion, the court held that the former client had only to show that the "matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters . . . wherein the attorney previously represented him, the former client." 113 F. Supp. at 268. Whatever bearing that decision might have if Mr. Z had joined in the prosecution or if Birnbaum had joined forces with the Government, that is not this case. Birnbaum was not a party-litigant. And, his testimony appears to have been not at all crucial. The District Court thus commented that "Birnbaum was not a prosecuting witness here. He testified with one exception as to records that were in his firm's possession." Moreover, Mr. Z's representation of Birnbaum did not extend to his appearance in the Grand Jury proceedings, when the possibility of conflicting interests first might have been detected,

or to his appearance at trial. Mr. Z, either by design or accident, was never in a position where in his representation of Birnbaum he might have made improper, if unconscious, use of confidences of his former clients. As far as the Re proceedings were concerned, Mr. Z as a practical matter had withdrawn before the possibility of conflict developed. See Canon 37, Canons of Professional Ethics.

We conclude that the conduct of Mr. Z was not improper and that appellants have failed to show that his professional relationship with Birnbaum prejudiced their defense in any manner. Their claim on this point falls well short of the mark that would justify reversing the convictions.

The judgments of conviction on counts one and two are affirmed; the conviction of appellant Batkin on count three is reversed with instructions to dismiss count three of the indictment as to him.

APPENDIX B

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of July, one thousand nine hundred and sixty-four.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HOWARD J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERARDO A. RE, also known as JERRY A. RE, GERARD F. RE, CHARLES A. CASAGRANDE, also known as CHARLES A. GRANDE, also known as CHARLES A. GRANDE, ELY BATKIN, LOWELL M. BIRRELL, et al.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court as to counts one and two be and they hereby are affirmed.

It is further oredered adjudged and decreed that the Judgment of Conviction of appellant Batkin as to count three be and it is hereby reversed with instruction to dismiss count three of the Indictment as to him in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 15, U.S.C.

77e. PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

TITLE 28, U.S.C.

§ 1732. RECORD MADE IN REGULAR COURSE OF BUSINESS; PHOTOGRAPHIC COPIES.

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business, to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.